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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

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No.

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DALLAS T. HELTSLEY and
CHARLES SCHMIDT,

Petitioners,

v.

DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA,

and

GIBRALTAR COAL CORPORATION,

Respondents.

---

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

---

## OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky is published as Heltsley v. District 23, UMW, 78 LRRM 2633 (Ky. Ct. App., 1971). Modification of that opinion on petition for rehearing is published as Heltsley v. District 23, UMW, 80 LRRM 2137 (Ky. Ct. App., 1972). Full text of the opinion as modified is appended to this petition.

## JURISDICTION

The Kentucky Court of Appeals affirmed dismissal of petitioners' suit, October 15, 1971, and filed a modified opinion denying petition for rehearing February 18, 1972. On May 12, 1972, Circuit Justice Stewart granted an extension of time within which to petition for certiorari to and including July 17, 1972.

This petition is timely filed under 28 U.S.C. 2101(c), and jurisdiction of it is conferred by 28 U.S.C. 1257(3).

## ISSUE PRESENTED

Whether the federal law governing a union's duty of fair representation allows a state court to dismiss a suit alleging breach of that duty through the

invocation of state pleading rules stricter than those applied in federal court.

## STATEMENT

This action was commenced by petitioners against their former employer, the Gibraltar Coal Corporation, and their union, District 23, United Mine Workers of America. Jurisdiction was premised on Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. 185, and petitioners alleged that their union in conspiracy with their employer had unlawfully secured their discharge from employment and unfairly represented them in the subsequent grievance proceedings. Specifically, they alleged that one John Stewart, a supervisor for Gibraltar, had threatened discipline against plaintiffs because of their union activities, and that W. A. Boyle, President of the United Mine Workers, had, through officers and representatives of District 23, threatened petitioner Heltsley with expulsion from union membership because of his internal union activities. The complaint also alleged that petitioners had been discharged by Gibraltar and that they had filed a contract grievance seeking reinstatement. Petitioners

further alleged that District 23 had engaged in unfair and invidious discrimination against them by unnecessarily delaying the presentation of their grievance to an arbitrator, that the union had refused their request for the selection of an impartial arbitrator, and, instead, selected an arbitrator who was not impartial, all with the knowledge and complicity of Gibraltar. Finally, petitioners alleged that District 23 permitted the presentation of irrelevant and prejudicial material to the arbitrator, which the arbitrator considered, and that the arbitrator unlawfully and unfairly sustained their discharge. 1/

1/ Since their discharges in November 1966, petitioners have unsuccessfully sought reemployment in the coal industry. Their failure to find mining jobs, during five years of constantly spiralling production and severe manpower shortages, carries a strong implication that they have been victims of blacklisting, and adds credence to their allegations of a conspiracy to prevent their reinstatement.

Blacklisting is especially deplorable when it arises as a reprisal for espousal, by the victim, of controversial or unpopular positions. Petitioner Heltsley, in particular, was a long-standing opponent of the trusteeship over District 23 maintained by the UMWA whereby the officers of District 23 are

/Footnote continued on following page./

All of these allegations were contained in the original complaint and the second and third amended complaints. Nevertheless, the trial court dismissed the third amended complaint. The Court of Appeals affirmed dismissal of the complaint, despite its recognition that petitioners had "alleged

1/ /Footnote continued from preceding page./ appointed by the International Union rather than elected by District members. Heltsley was critical of these appointed District officers and incurred their hostility by speaking out for District autonomy. Proceedings of 43rd Consecutive Constitutional Convention of the UMWA, 1960, pp. 360-1; Proceedings of 44th Consecutive Constitutional Convention of the UMWA, 1964, pp. 330, 424-5. Petitions submitted to the United States Department of Labor by District 23 members desiring autonomy led to the initiation of suit by the Secretary, in 1964, for the restoration of autonomy in various UMWA districts including District 23. This suit culminated in a recent decision holding that District 23 and other UMW Districts have been unlawfully maintained in trusteeship, Hodgson v. UMWA, 80 L.R.R.M. 2470 (D.D.C., 1972). The efforts of petitioner Heltsley for District autonomy severely jeopardized the jobs of District 23's officers, but that cannot excuse complicity by them in depriving him of his job. Petitioners' allegation that District 23, because of personal hostility, failed fairly to represent them raises matters of serious concern to all workingmen which should not have been dismissed without trial.

that the union and Gibraltar had conspired to effect their wrongful discharge from employment and that the union had not fairly represented them." The Court of Appeals found that under Section 301 of the NLRA, 29 U.S.C. 185, the state courts had jurisdiction of cases of this nature, but held that dismissal of the complaint was warranted because plaintiffs had failed to state a claim upon which relief could be granted.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

### The Invocation of State Procedural Rules to Prevent the Maintenance of Suits Alleging Breach of Federally Guaranteed Rights Presents a Substantial Question Not Heretofore Decided by this Court.

There is perhaps no other area of the law where this Court has spoken more frequently and with greater precision than in the area of the duty of fair representation that a union owes to its members. Beginning with Steele v. Louisville and Nashville R. R., 323 U.S. 192 (1944), through Vaca v. Sipes, 386 U.S. 171 (1967), the Court repeatedly stated that unions are required to fairly represent each union member without invidious and unfair discrimination. The duty of fair representation

is required of unions within the jurisdiction of the Railway Labor Act, 45 U.S.C. 151, et seq., Steele v. Louisville and Nashville R.R., 323 U.S. 192; Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944), and the National Labor Relations Act, 29 U.S.C. 141 et seq., Syres v. Oil Workers, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Humphrey v. Moore, 375 U.S. 335 (1964). Invidious, irrelevant and unfair discrimination includes, but is not limited to, discrimination against union members because of their race. Compare Steele, supra, with Ford Motor Co. v. Huffman, supra; Humphrey v. Moore, supra, and it is now settled that a union member has concurrent avenues of relief, either before the National Labor Relations Board or before the state and federal courts. Vaca v. Sipes, supra, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

The Supreme Court has had the occasion to consider the sufficiency of a complaint in a fair representation suit brought in federal court, Conley v. Gibson, 355 U.S. 41 (1957). In that case, several Negro union members filed suit against

their union alleging that they had been demoted or discharged by their employer in violation of their contractual rights and that their "Union, acting according to plan, did nothing to protect them against these discriminatory discharges . . . . The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith." Id., at 43. The Union argued that the district court had properly dismissed the complaint for failure to state a claim, but this Court rejected that argument holding:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all

of the employees in the bargaining unit." Id., at 45-46.

In Conley -- as here -- the respondent union argued that the complaint failed to allege "specific facts to support its general allegations of discrimination" and that dismissal was proper. This Court responded:

> "The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice', we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents' fair notice of its basis. The Federal Rules

> reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197." Id., at 47-48.

In Czosek v. O'Mara, 397 U.S. 25 (1970), aff'g O'Mara v. Erie Lackawanna R.R. Co., 407 F.2d 674 (C.A. 2, 1969), this Court affirmed the Court of Appeals' reversal of an order dismissing a fair representation claim though noting the complaint was "not as specific with regard to union discrimination as might have been desirable." The complainants in that case were railroad employees discharged after their railroad merged with another, and replaced by employees of the other railroad. Their complaint, in conclusory fashion, accused their union of "hostile discrimination" and failed, according to the Court of Appeals, to make clear the basic reason for their grievance. Nevertheless the Court of Appeals recited that oral argument on appeal revealed the basic reason for the plaintiffs' grievance, namely that "the union defendants are

under the influence of the former employees" of the other railroad. The Court of Appeals held "that such a claim of political discrimination states a good cause of action under the Railway Labor Act." 407 F.2d at 679. (Emphasis added.) This Court's affirmance of that decision is significant here since political discrimination is also the gravamen of petitioners' complaint, n. 1, supra.

The erection of burdensome procedural barriers to the maintenance of fair representation suits in state courts is contrary to the spirit of Czosek and Conley. 2/ This Court has clearly shown an expectation that

2/ The Court of Appeals' attempt to distinguish Conley in the modification of its opinion on petition for rehearing is transparent. The Court of Appeals stressed that Conley involved allegations of racial discrimination, but the duty of fair representation extends to all forms of invidious discrimination. Also wide of the mark is the Court of Appeals' observation that in Conley it was alleged that the union failed in any way to protest denials of complainants' rights, whereas here the union did process the grievance through arbitration. This totally ignores petitioners' allegation that the respondents conspired to select an umpire who was not impartial, which plainly suffices to state a claim if the Conley standard is to govern.

such suits would be maintainable in state courts. Charles Dowd Box Co., supra, Vaca, supra. In Vaca, supra, at 87, the Court stated:

> ". . . it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many Section 301 breach-of-contract actions." (Emphasis added.)

Surely this Court will not allow state trial courts, to circumvent this obligation to the detriment of federally guaranteed rights by invoking overly strict rules of pleading. See Brady v. Southern Ry., 320 U.S. 476, 479 (1943); Testa v. Katt, 330 U.S. 386 (1947).

Notably the only case cited by the Court of Appeals for its conclusion regarding the insufficiency of the complaint was Thomas v. Consolidation Coal Co., 380 F.2d 69 (C.A. 4, 1967), cert. denied, 389 U.S. 1004. While the district court dismissed the complaint in that case for failure to allege fraud with sufficient particularity, the Fourth Circuit -- with good reason in view of Conley, supra -- saw substantial problems with that ground for dismissal and explicitly left the question open, affirming

the district court's dismissal on the ground that the state court had previously rejected plaintiffs' position on the merits, and the state court decision was res judicata. The Court of Appeals decision in Thomas is not relevant to the question of particularity of pleading and the district court's decision, which does speak to that issue, can hardly be more persuasive here than it was to the Fourth Circuit which disavowed it.

Of greater significance are numerous federal court decisions allowing maintenance of fair representation suits involving similar allegations of union-employer conspiracy and political discrimination. Williams v. Pacific Maritime Assn., 384 F.2d 935 (C.A. 9, 1967), cert. denied, 390 U.S. 987 (union-employer conspiracy to deregister complainants as longshoremen); Hall v. Pacific Maritime Assn., 281 F. Supp. 54 (N.D. Cal., 1968); Hill v. Aro Corp. 275 F. Supp. 482 (N.D. Ohio, 1967) (union biassed against complainant in arbitration proceeding); Watson v. Cudahy Co., 315 F. Supp. 1286 (D. Col., 1970) (union and employer interest in arbitration proceeding both opposed to complainant's interest and complainant had no voice in choosing arbitrator);

Desrosiers v. American Cyanamid Co., 299 F. Supp. 162 (D. Conn., 1969) (union-employer conspiracy); Richardson v. Communications Workers, 267 F. Supp. 403 (D. Neb., 1967) (union-employer conspiracy); Powers v. Troy Mills, Inc., 303 F. Supp. 1377 (D. N.H., 1969) (union, in conspiracy with employer, failed fairly and properly to represent complainant's interest in grievance procedure); Rivera v. NMU Pension Plan, 288 F. Supp. 874 (E.D. La., 1968) (mere allegation of "unfair representation" states a claim, though plaintiff must provide "strict proof" to prevail on the merits); Plant v. Local 199, Laborers, 76 LRRM 2992 (D. Del., 1971) (allegation that employer, with assistance and approval of union fired complainant because of his "opposition" states a claim under § 301); Fuller v. Truck Drivers Local 107, 233 F. Supp. 115 (E.D. Pa., 1964) (advocates liberal view in assessing sufficiency of fair representation complaint).

Judged in the light of these decisions and of Conley and Czosek, petitioners' complaints were plainly sufficient to claim violation of federal fair representation rights. This Court's review is necessary

to assure that those rights will not go unprotected when asserted in state courts.

## CONCLUSION

For the reasons stated, the petition for certiorari should be granted and the decision below reversed.

Respectfully submitted,

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## APPENDIX

Court of Appeals of Kentucky

No. W-148-70

Fall Term, 1971

DALLAS T. HELTSLEY, et al.,

Appellants,

v.

DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA, et al.,

Appellees

/Filed October 15, 1971; modified February 18, 1972./

Dick Vermillion, C.C.A.

Appeal from Muhlenberg Circuit Court.

## MODIFIED OPINION

## Full Text of Opinion

REED, Judge: -- Dallas T. Heltsley, Charles Schmidt, and Gene Johnson were discharged by their employer, Gibraltar Coal Corporation. The employees were officials[1] of Local Union No. 1092 of United Mine Workers of America. A collective bargaining agreement, which provided for arbitration of grievances, was in effect between the parent union and an association of employers of which Gibraltar was a member at the time of the discharge. The union unsuccessfully sought the institution of an unfair labor practice charge against the employer by the N.L.R.B.; the Union's claim was that the discharge was wrongful.

Thereafter, the union preferred a grievance charge against the employer, again on the basis that the employees had been wrongfully discharged. The arbitrators selected by the union and employer were unable to agree, and the dispute was

1/ Heltsley was president and with Schmidt and Johnson composed "the mine committee" of the local.

submitted to an umpire, who found that the discharges were proper. Then the discharged employees sued the union and their former employer in the state circuit court; they alleged that the union and Gibraltar had conspired to effect their wrongful discharge from employment and that the union had not fairly represented them. They also charged that the umpire's award was tainted by fraud and collusion and that his decision, on its face, showed manifest unfairness and error.

The union and Gibraltar moved to dismiss the complaint filed by the discharged employees. The complaint was twice amended after the trial judge had ruled it insufficient. Finally, the third amended complaint was also dismissed and the discharged employees have appealed to this court and assert that the trial court should have disposed of their suit on its merits, after a trial. The critical question is whether the employees' pleading together with its amendments in view of the record demonstrated a triable cause of action.

A work stoppage occurred at the employer's premises; the premises were picketed by the "prospect drillers" who were members of a local other than that with which the appellants were affiliated, but which was a component of the same parent union. The work stoppage and picketing were in breach of a "no strike" collective bargaining agreement. The employer claimed that appellants aided, encouraged, and participated in the illegal strike and failed in their explicit contractual duty to use their best efforts to terminate the illegal work stoppage; it was upon these expressed grounds that the employer discharged the appellants.

The record contains the specific findings of the N.L.R.B. that the discharges were proper and not an unfair device to punish appellants for legitimate union activities. The N.L.R.B. decision 2/ was reviewed and confirmed by its national general counsel. The record also demonstrates that extensive evidence was presented to the arbitrators. The opinion of the umpire evidences a thorough consideration of all

2/ A finding by the Regional Director.

the evidence. The appellants' pleadings do not claim that pertinent evidence was omitted. Although the pleadings do allege that the umpire had received a political contribution from the union when he was a candidate for public office, the appellants failed to allege that they objected to his acting after his appointment was known. They do not state that any suggestion of a conspiracy between the employer and the union was presented to the arbitrators or to the umpire or to the N.L.R.B. They do not allege that the umpire had knowledge of or was a participant in any conspiracy.

From our decisions in Armco Steel Corporation v. Perkins, Ky., 411 S.W. 2d 935; Moore v. Local Union No. 89, etc., Ky., 356 S.W. 2d 241; and Smith v. Hillerich & Bradsby Co., Ky., 253 S.W. 2d 629, 19 LA 745, and from the decisions of the United States Supreme Court in Humphrey v. Moore, 375 U.S. 335; Smith v. Evening News Ass'n, 371 U.S. 195; and Dowd Box Co. v. Courtney, 368 U.S. 502, the steady, but tortuous, path of the development of the idea of concurrent jurisdiction by the federal and state courts to serve as

available avenues for the disposition of labor disputes may be observed. It now seems clear that while the National Labor Relations Board retains exclusive primary jurisdiction over unfair labor practices as explicated in 29 U.S.C., Sec. 158, and as recognized by the Supreme Court in San Diego v. Garmon, 359 U.S. 236; nevertheless, where the alleged unfair labor practice also violates a collective bargaining agreement, the jurisdiction of the courts (state and federal) is not displaced, and the judiciary remains the place where the parties to a collective bargaining agreement should seek to enforce their contract. This is made evident by the Supreme Court's interpretation of Sec. 301(a) of the Labor Management Relations Act of 1947 (29 U.S.C., Sec. 185) in Dowd Box Co. v. Courtney cited above.

If appellants' claim was restricted to unfair representation of them by their union, it could well be argued that this addressed itself to the N.L.R.B. as a primary matter, and the state courts are precluded, as an original action proposition at the least, from entertaining it under the Garmon doctrine. Appellants' claim

of the existence of a breach of the duty of fair representation by their union was not supported by the facts, according to the N.L.R.B. Appellants assert, however, that the breach by their union accomplished a tainted and unfair arbitration result under a collective bargaining agreement. Hence, we conclude that although the courts have jurisdiction of the claim, its validity as a triable cause of action must be determined by focusing on the arbitration accomplished and not on the alleged unfair labor practice per se, which has been rejected by the N.L.R.B. and is not repeated in subsequent state court proceedings in conclusionary terms.

In Smith v. Hillerich & Bradsby Co., Ky., 253 S.W. 2d 629, 19 LA 745, we said:

> "The law favors and encourages the settlement of controversies by arbitration, and arbitrators are not expected or required to follow strict rules of law, it being sufficient that they have due regard for natural justice. If the parties wanted exact justice administered according to the forms of law they should not have agreed to substitute a private forum for a court of law."

In the instant case, the appellants accepted the benefits of the collective bargaining agreement and are, of course, bound by its provisions governing the adjudication of grievances. Textile Workers v. Lincoln Mill 353 U.S. 448, demonstrates that congressional policy is in favor of agreements to arbitrate. Teamsters Local 174 v. Lucas Flour Company, 369 U.S. 95, holds that state courts in exercising jurisdiction under Sec. 301(a) of the Labor Management Relations Act of 1947, wherein a collective bargaining contract is necessarily involved, should apply federal substantive labor law. The Boys Markets Incorporated v. Retail Clerk's Union Local 770, 398 U.S. 235, is the latest expression from the Supreme Court which is relevant. In this opinion, the importance of arbitration as the means of settling labor disputes is emphasized. For a critique of the result reached in the case, see 59 Ky. L.J. 755. There is general agreement, however, that arbitration is favored as a matter of federal policy.

Our examination of the record in this case has convinced us that after three attempts the appellants are unable to allege

a state of facts sufficient to warrant judicial examination of the award that resulted from arbitration. We are not inclined to explore how specifically the pleader must frame his complaint under the "particularity" requirement of CR 9 so far as averments relating to fraud are concerned. It appears to us that the umpire's award is confirmatory of the N.L.R.B. findings. It can hardly be characterized as unfair on its face. The conduct of the arbitration proceedings was not objected to on allowable grounds. Where a party undertakes to collaterally attack the award of an umpire in a case such as this, certainly more definite statements of fact must be required than are present. We must assess the sufficiency of the appellants' showing in view of the type of issue presented. Cf. Thomas v. Consolidation Coal Company, 380 F.2d 69 (C.A. 4). Cert. denied, 389 U.S. 1004.

It appears to us that appellants were afforded full opportunity to state their claim in full detail and that they undertook to do so. The contents of the complaint as amended with the inferences to be drawn from them, on the whole record,

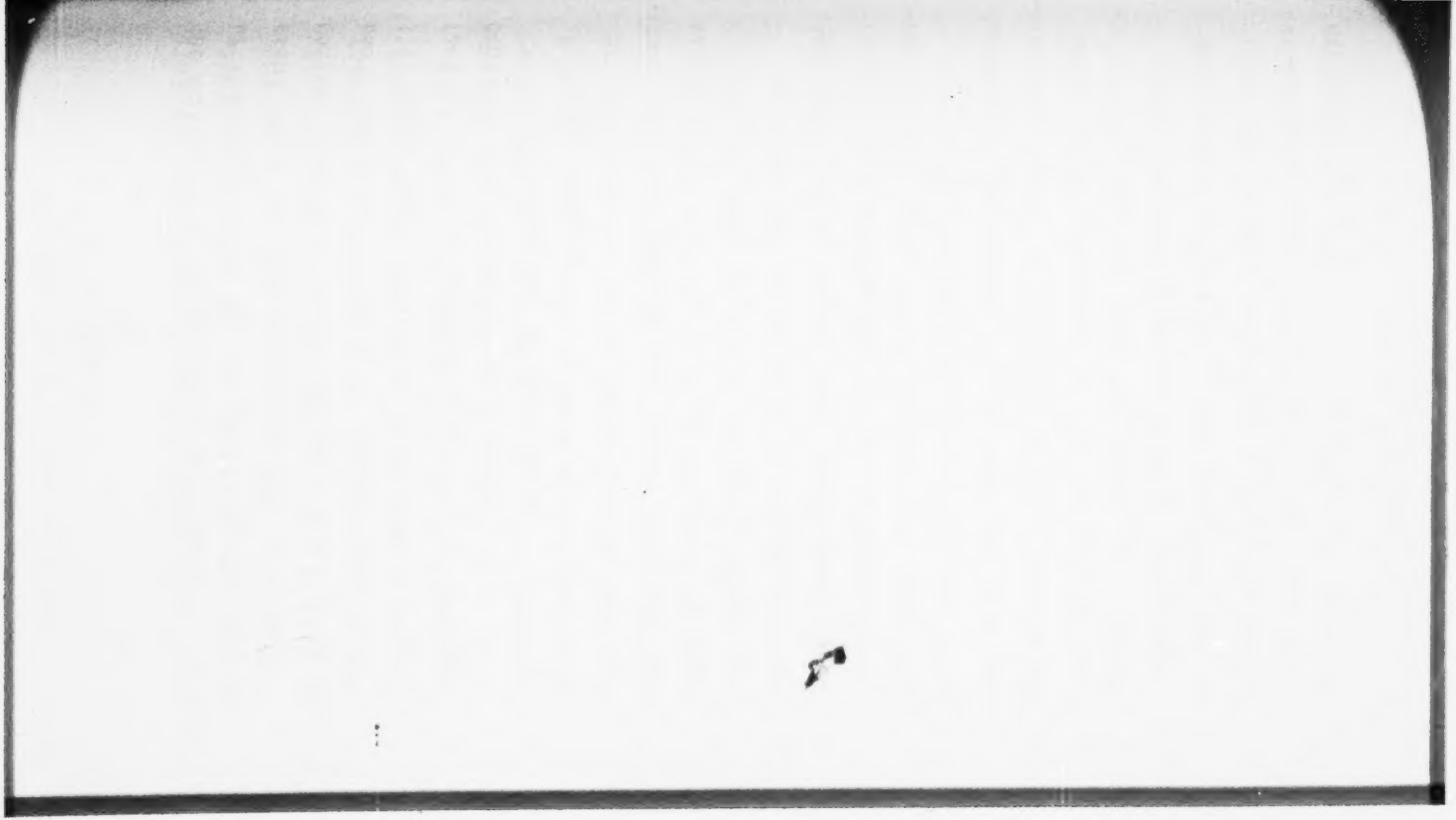
will not support their claim for relief; hence, as pointed out in Security Trust Company v. Dabney, Ky., 372 S.W. 2d 401, a motion to dismiss serves substantially the same purpose as a motion for summary judgment and should be sustained. That is precisely what the trial judge did.

Appellants filed a petition for rehearing. In this petition for the first time they cite Conley v. Gibson, 355 U.S. 41, and assert that it is dispositive in the instant case. We disagree. The Conley case involved a situation under the Railway Labor Act, 35 U.S.C.A. 151, et seq., whereby members of a union charged in their complaint that their union discriminated against them because of their race. The complaint alleged that the discrimination consisted of failure to protest in any way the discharge, demotion or removal of seniority rights for the Black complainants while the White members of the same union were afforded full representation in protest of such actions affecting them. In the instant case, the union preferred an unfair labor practice charge to the NLRB and processed a grievance completely through the arbitration route provided in

the collective bargaining agreement. We are of the view that our disposition of the instant case is not inconsistent with the Conley case nor is it inconsistent with the basic holding in Vaca v. Sipes, 386 U.S. 171, when that opinion is considered in its factual context compared with the factual context presented by this case.

The judgment is affirmed.

All concur.



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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 72-80

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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DALLAS T. HELTSLEY and CHARLES SCHMIDT,
*Petitioners*

v.

DISTRICT NO. 23, UNITED MINEWORKERS OF AMERICA and GIBRALTAR COAL CORPORATION,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky**

---

## BRIEF FOR GIBRALTAR COAL CORPORATION IN OPPOSITION

---

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IN THE

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*Petitioners*

v.

DISTRICT NO. 23, UNITED MINEWORKERS OF AMERICA and GIBRALTAR COAL CORPORATION,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky**

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## BRIEF FOR GIBRALTAR COAL CORPORATION IN OPPOSITION

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### OPINIONS BELOW

The orders of the Muhlenberg (Kentucky) Circuit Court are unreported. The modified opinion of the Court of Appeals of Kentucky is reported at 477 S.W. 2d 134.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether the Court of Appeals of Kentucky properly affirmed the dismissal of a Complaint where Plaintiffs, despite three opportunities to amend, failed to frame a complaint containing allegations sufficient to deny an Umpire's award, pursuant to a collective bargaining agreement, the binding effect accorded it under federal law.

## STATUTE INVOLVED

The pertinent provision of Section 301 of the National Labor Relations Act, as amended (29 U.S.C. § 185(a)), is set forth as follows:

> "§ 185. Suits by and against labor organizations—Venue, amount, and citizenship
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> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

## STATEMENT OF THE CASE

Since 1966, this case has, in one form or another, been scrutinized, on ten separate occasions, either privately (through grievance procedures established under a collective bargaining agreement), administratively or judically, as follows: once by the Regional Director and twice by the General Counsel of the National Labor Re-

lations Board; once by an umpire; four times by the Muhlenberg (Kentucky) Circuit Court; and twice by a unanimous Court of Appeals of Kentucky (hereinafter referred to as the "court below"). On each such occasion the issues raised by the Petitioners were decided against them; it is the latest in this long series of adverse rulings—affirmance by the court below, on petition for rehearing, of the dismissal of Petitioners' Third Amended Complaint—from which the Petitioners seek review by this Court.

The Petitioners (two of the three original Plaintiffs) were employees of Gibraltar Coal Corporation ("Gibraltar") and members of Local Union No. 1092, a local affiliate of District No. 23, United Mine Workers of America. Gibraltar was a party to a collective bargaining agreement ("Agreement") with District No. 23 ("Union").

Petitioners, members of the "Mine Committee",[1] were discharged by Gibraltar on November 10, 1966 after they participated in a work stoppage and picketing which "were in breach of a 'no strike' collective bargaining agreement." (Opinion of court below, Petitioners' Appendix, p. 4a).[2]

Following the rejection of Petitioners' charges of unlawful discharge by the Regional Director of the NLRB (and the subsequent affirmation of that decision on two occasions by the General Counsel of the NLRB), the Petitioners' discharges were considered pursuant to the full grievance procedure established under the Agreement. When the fourth step of that procedure

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[1] See Opinion of the court below, Petitioners' Appendix, p. 2a.

[2] The suggestion of blacklisting throughout the coal industry, improperly proffered to this Court in Footnote 1 of the Petition (pp. 4-5), is completely outside the record.

was reached and the Joint Board of Arbitrators was unable to agree, the grievance was referred to an umpire ("Umpire") for a "final" determination as provided in step five of the grievance procedure. The transcript of "extensive evidence" was considered by the Umpire, who, in a written opinion dated March 24, 1967, denied the grievance and sustained the discharges. (Opinion of the court below, Petitioners' Appendix, p. 4a).

Dissatisfied with the determinations of the Regional Director and General Counsel of the NLRB and with the outcome of the arbitration, the Petitioners commenced, in the Muhlenberg Circuit Court, an action against Gibraltar and the Union seeking reinstatement and damages, attacking the award of the Umpire and seeking to deny that award the binding effect accorded it under the collective bargaining agreement. The separate motions of Gibraltar and the Union to dismiss the Complaint, the Amended Complaint, the Second Amended Complaint and the Third Amended Complaint were all granted, the latter being dismissed with prejudice.

Petitioners thereafter appealed the dismissal of the Third Amended Complaint to the court below which, in a written opinion, unanimously affirmed.

Subsequently, on December 10, 1971, the Petitioners filed a petition for rehearing. In unanimously "overruling" that petition, the court below modified its written opinion to address itself to the assertion, raised for the first time in the Petition for Rehearing, that the decision of the court below is inconsistent with cases previously decided by this Court.[3]

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[3] See Opinion of the court below, Petitioners' Appendix, pp. 10a-11a.

## ARGUMENT

### I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL QUESTION WHICH WARRANTS REVIEW BY THIS COURT.

#### A. Petitioners Have Misstated the Holding of the Court Below.

Petitioners assert that the decision of the court below is inconsistent with the "spirit" of the decisions of this Court in *Conley* v. *Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) and *Czosek* v. *O'Mara,* 397 U.S. 25, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970). Specifically, Petitioners assert that, in a cause of action for breach of the duty of fair representation, the court below violated *Conley* and *Czosek* by the invocation of state procedural rules which are allegedly more strict than those applied in federal court.[4] Petitioners' description of the holding of the court below is inaccurate[5] and ignores completely the actual grounds upon which that court relied in affirming and reaffirming the dismissal of the Third Amended Complaint.[6]

The court below correctly held that the validity of Petitioners' claim must be determined on the basis of the whole record, which included the Umpire's opinion and award, attached to Petitioners' Third Amended Complaint. The court below concluded that Petition-

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[4] Petitioners do not appear to contend that the express provisions of the Kentucky Rules are in conflict, in any material respect, with the Federal Rules of Civil Procedure.

[5] The court below regarded itself as bound by federal law. Citing *Teamsters Local 174* v. *Lucas Flour Company,* 369 U.S. 95 (1962), it expressly recognized that it was required to follow federal law. (Opinion of the court below, Petitioners' Appendix, p. 8a.)

[6] See, for example, the opinion of the court below, Petitioners' Appendix, p. 9a, where the court stated, "We are not inclined to explore how specifically the pleader must frame his complaint under the 'particularity' requirement of CR 9 so far as averments relating to fraud are concerned."

ers' complaint failed to contain allegations "sufficient to warrant judicial examination of the award that resulted from arbitration." (Opinion of the court below, Petitioners' Appendix, pp. 8a-9a).[7]

**B. The Court Below Correctly Applied the Principles of Federal Law as Enunciated by the Supreme Court of the United States.**

As previously announced by this Court in *Czosek*, complaints in fair representation cases "should be construed to avoid dismissals." (*Czosek*, 397 U.S. 25, 27). It is evident that the court below fulfilled this requirement of federal law. That every inference favorable to the plaintiff was made by the court below in assessing the sufficiency of the complaint, in compliance with this Court's injunction in *Czosek*, is evident from its finding that "the contents of the complaint as

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[7] The court below, far from acting contrary to *Conley*, applied the very principles enunciated by that case, as its opinion indicated. In *Conley*, as in *Czosek*, the complaint alleged that the unfair representation consisted of the union's total refusal to press the employees' grievances before National Railroad Adjustment Board, as provided in the Railway Labor Act. In the case at bar the grievance was processed completely through the arbitration route provided in the Agreement. The legal insufficiency of the "conclusory" (see Petition, p. 10) verbalization claimed by Petitioners to be adequate, is not only inherent in *Czosek* and *Conley*, but is required under federal law, as announced in the *Steelworkers* trilogy, where, as here, an attempt is made to have the court overturn what otherwise would be a final and binding award by arbitration.

*Thomas* v. *Consolidation Coal Co.*, 380 F.2d 69 (CA 4, 1967), *cert. den.*, 389 U.S. 1004 (1968) (Petitioners' Appendix, pp. 10-11) referred to by Petitioner was cited by the court below (Petitioners' Appendix, p. 9a), by way of pointing out that in *Thomas*, as here, an arbitration proceeding had been held, whereas in *Conley* there had been a refusal by the union to take the employees' grievance to arbitration.

amended *with the inferences to be drawn from them,* on the whole record will not support their claim for relief" (emphasis supplied). (p. 9a). The Petition, in its reference to *Czosek,*[8] fails to refer to the Court's direction therein that in the final determination of whether a complaint should be dismissed, a significant element is the extent to which the plaintiff has been "given the opportunity to file supplemental pleadings unless it appears 'beyond doubt' that he cannot state a good cause of action." (*Czosek,* at p. 27).

In this case, Petitioners were given three opportunities to amend their original complaint. In each instance, they failed to raise their allegations or "the inferences to be drawn from them" to a level which could withstand a motion to dismiss. There is nothing in any decision of this Court which requires a trial court to permit the amendment of pleadings *ad infinitum* in order to meet the standards of *Czosek;* in the instant case, Petitioners declined to seek further amendment, rejecting any additional opportunity for allegations less conclusory than naked avowal. We respectfully submit that the court below properly determined that, in granting three opportunities to amend pleadings, the trial court indulged Petitioners' conclusory allegations to the point where it was apparent that they could not state a good cause of action.

It is the well established policy of this Court that arbitration is the desirable method for settlement of

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[8] While Petitioners did not rely on *Czosek,* either in their brief to the court below or in their Petition for Rehearing, it is obvious that in reaching its decision, the court below was well aware of, and applied, the standards of *Czosek.* Petitioners cannot properly contend that the court below refused to follow *Czosek;* their disagreement is with the court's application of *Czosek* to their pleadings.

grievance disputes and that courts should not generally review the merits of an arbitrator's award. See Section 203(d) of the Labor Management Relations Act [29 U.S.C. § 173(d)]; *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). In order for Petitioners to avail themselves of the equally well-established principle that courts will not give binding effect to an arbitration award in the face of a showing of the breach, by the involved union, of the duty of fair representation (See *Humphrey* v. *Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F. 2d 167 (5th Cir. 1971) and cases cited therein, and *Thomas* v. *Consolidation Coal Co.*, 380 F. 2d 69 (4th Cir., 1967) *cert. den.* 389 U.S. 1004 (1968)), their pleadings must contain more than conclusory characterizations. Petitioners have not met this requirement; hence, no substantial question is presented for review by this Court.[9]

[9] What is evident from United States District Court opinions, some of which were referred to by Petitioner (Petition, pp. 13-14, is that the doctrine that breach of duty complaints should be liberally construed is well understood in the lower courts, including the court below, as appears from its opinion.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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